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# The Supreme Court Chipping Away at Title VII: Strengthening It or Killing It?

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*"This Civil Rights Act is a challenge to all of us to go to work in our communities and our States, in our homes and in our hearts, to eliminate the last vestiges of injustice in our beloved country."*[1]

## INTRODUCTION

As President Lyndon Johnson noted 50 years ago, the Civil Rights Act of 1964 was passed to help eliminate injustice and ensure that all would have a reasonably equal opportunity to enjoy the riches of American society.[2] More specifically, Title VII of the 1964 Civil Rights Act (Title VII) focuses on providing equal opportunity in the workplace, which allows individuals to rise or fall based on their talent. However, what equal opportunity has meant in the past and what equal opportunity will mean in the future is contested. Though the meaning of the basic provisions of a statute that has been law for 50 years should be settled, Title VII's meaning is not settled. Indeed, over the past few years, the Supreme Court has destabilized the meaning of Title VII by rethinking doctrines that many thought established.[3] How the Supreme Court will shape Title

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1. This quote is from President Lyndon Baines Johnson's statement accompanying the signing of the Civil Rights Act of 1964. President Lyndon B. Johnson, Radio and Television Remarks Upon Signing the Civil Rights Bill (July 2, 1964) (transcript available at http://www.lbjlib.utexas.edu/johnson/archives.hom/speeches.hom/640702.asp [http://perma.cc/TZN5-UZS7] (archived Apr. 2, 2014)).

2. Some have suggested employment discrimination law to be a project of near Biblical proportions. *See* William R. Corbett, *Babbling About Employment Discrimination Law: Does The Master Builder Understand the Blueprint for the Great Tower?*, 12 U. PA. J. BUS. L. 683, 685 (2010) ("From the beginning, it was an astoundingly ambitious, and perhaps audacious, project. Congress envisioned a tower of law that would elevate people, reaching toward the heavens by attempting to eradicate invidious employment discrimination.").

3. *See generally* Henry L. Chambers, Jr., *The Wild West of Supreme Court Employment Discrimination Jurisprudence*, 61 S.C. L. REV. 577, 577–79 (2010); *see also* Martin J. Katz, Gross *Disunity*, 114 PENN. ST. L. REV. 857, 857 (2010) (noting that the Supreme Court has begun to shed some of its interpretive principles in employment discrimination cases as it has abandoned its preference for deeming similar language in employment discrimination statutes to have the same meaning).

VII doctrine and what that will mean for equal opportunity in the workplace is unclear.

Title VII prohibits covered employers from discriminating with respect to an employee's terms, conditions, or privileges of employment or compensation because of the employee's race, color, sex, religion, or national origin.[4] In addition, employers are barred from discriminating against individuals because they have formally or informally challenged practices that they believe violate Title VII.[5] Those simple prohibitions have been the subject of discussion and analysis for 50 years. At times, the Supreme Court has boldly pushed the limits of Title VII in favor of equality. For example, its decision in *Griggs v. Duke Power Co.* confirmed Title VII's expansive reach by noting the existence of a disparate impact cause of action under Title VII.[6] Conversely, at times, the Supreme Court's support for Title VII's basic goals has been suspect. During the late 1980s, the Court's narrow interpretation of Title VII helped lead to the passage of the Civil Rights Act of 1991.[7] The 1991 Act installed a number of features into the employment discrimination landscape that significantly altered Title VII, including jury trials and punitive damages.[8]

However, in recent years, the Supreme Court's interpretation of Title VII and other employment discrimination statutes has called into question the future arc of Title VII doctrine.[9] The Court appears ready to redefine nondiscrimination and equality under Title VII. Indeed, some of the Court's rulings suggest that a robust quest for full equality in the workplace may not be achievable without amendments to Title VII's current text.[10] Rather than broaden Title VII protections through doctrinal evolution in the same manner that

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4. *See* 42 U.S.C. § 2000e-2(a) (2006).

5. *See id.* § 2000e-3.

6. 401 U.S. 424, 431–33 (1971). Twenty years later, the disparate impact cause of action was formalized in the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071.

7. *See* Michael J. Zimmer, Wal-Mart v. Dukes*: Taking the Protection out of Protected Classes*, 16 LEWIS & CLARK L. REV. 409, 428 (2012) (noting that the 1991 Civil Rights Act was passed in response to Supreme Court doctrine).

8. *See* Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071.

9. *See infra* Part II.

10. Indeed, *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007), triggered the Lilly Ledbetter Equal Pay Act, Pub. L. No. 111-2, 123 Stat. 5 (2009). That Congress had to amend a statute does not necessarily mean that the case at issue was wrongly decided, at least with respect to precedent. *See* Charles A. Sullivan, *Raising The Dead?: The Lilly Ledbetter Fair Pay Act*, 84 TUL. L. REV. 499, 501 (2010) ("First, *Ledbetter* was by no means a radical decision; indeed, it was the logical outgrowth of earlier, very restrictive Supreme Court opinions interpreting Title VII statute of limitations periods.").

some earlier Courts have, the current Court is chipping away at Title VII's protections.[11] Even in areas in which the Court appears willing to support a broadened application of Title VII, it has narrowed Title VII's effective reach with procedural and substantive roadblocks that make potential claims less promising. This approach may be by design or it may be—as the Supreme Court argues in its opinions—that the Court is merely applying Title VII's text, with statutory amendment being the appropriate solution for any of Title VII's supposed shortcomings.[12]

Whether the Court's chipping away at Title VII is an attempt to make Title VII into a 21st century diamond, or an attempt to make it a 21st century pile of diamond dust, or merely an attempt to interpret Title VII consistent with its text is a matter of opinion. This Article explores how the Court is interpreting and reinterpreting Title VII and necessarily considers whether the Court's reinterpretation will likely reinvigorate or damage Title VII's broad goal of workplace equality. This Article tentatively considers what may be next for Title VII. Part I briefly discusses Title VII's scope. Part II notes how some of the Court's recent cases affect Title VII doctrine. Part III suggests how the Court's decisions may affect Title VII's ability to facilitate a broad vision of equality in the workplace.

## I. TITLE VII'S SCOPE

Title VII is supposed to help ensure equality in the workplace by removing barriers that have yielded systematic inequality in that setting.[13] This requires focusing both on the language and structure of Title VII so that it can be read consistently with its purpose. The Supreme Court has, in the past, attempted to read ambiguous text consistent with Title VII's broader purposes.[14] When used properly, that interpretive method does not override Title VII's text. Rather, it confirms the text's meaning when the text is deemed somewhat unclear.

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11. *See infra* Part II.

12. *See* Lewis v. City of Chicago, 560 U.S. 205, 215 (2010) ("If the effect of applying Title VII's text is that some claims that would be doomed under one theory will survive under the other, that is the product of the law Congress has written. It is not for us to rewrite the statute so that it covers only what we think is necessary to achieve what we think Congress really intended.").

13. *See* McDonnell Douglas v. Green, 411 U.S. 792, 800 (1973) ("The language of Title VII makes plain the purpose of Congress to assure equality of employment opportunities and to eliminate those discriminatory practices and devices which have fostered racially stratified job environments to the disadvantage of minority citizens.").

14. *See, e.g.*, Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 82 (1998) (interpreting Title VII to encompass same-sex sexual harassment).

Title VII is broad. It applies to employers, employment agencies, and labor organizations.[15] Employers cannot discriminate with respect to an individual's or employee's employment because of the individual's race, color, religion, sex, or national origin.[16] Likewise, employment agencies cannot refuse to refer an individual for a job because of the individual's race, color, religion, sex, or national origin.[17] Lastly, labor organizations cannot restrict access to membership in the organization or decline to admit an individual to an apprentice or training program because of the individual's race, color, religion, sex, or national origin.[18] Title VII suggests that those who control work are supposed to provide work on an equal basis without respect to certain characteristics that an individual possesses.

Title VII bars discrimination broadly. It bars intentional discrimination and retaliation against individuals.[19] Title VII bars intentional discrimination, and some forms of unintentional discrimination, against groups.[20] Title VII allows individuals and the Equal Employment Opportunity Commission (EEOC) to sue under Title VII.[21] Individuals can sue to address disputes between an individual employee and an employer.[22] The EEOC can sue on behalf of a person or groups of people.[23]

Title VII allows broad recovery for discrimination.[24] It provides monetary relief for past harm, allowing recovery for back pay to cover pay and benefits that an employee would have earned had the employee not been subject to discrimination,[25] as well as compensatory and punitive damages in certain circumstances.[26] It provides relief for future harm, authorizing reinstatement to a position or front pay in lieu of reinstatement when reinstatement is

15. 42 U.S.C. § 2000e-2 (2006).
16. *Id.* § 2000e-2(a).
17. *Id.* § 2000e-2(b).
18. *Id.* § 2000e-2(c).
19. *Id.* §§ 2000e-2(a), 2000e-3(a).
20. *See, e.g.*, Hazelwood Sch. Dist. v. United States, 433 U.S. 299 (1977) (discussing intentional discrimination); Dothard v. Rawlinson, 433 U.S. 321 (1977) (discussing unintentional discrimination).
21. 42 U.S.C. § 2000e-5(f) (2006).
22. *See, e.g.*, Burlington Indus., Inc. v. Ellerth, 524 U.S. 742 (1998).
23. *See* § 2000e-5(f); *e.g.*, Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C., 132 S. Ct. 694 (2012).
24. *See* Leticia M. Saucedo, *Addressing Segregation in the Brown Collar Workplace: Toward a Solution for the Inexorable 100%*, 41 U. MICH. J.L. REFORM 447, 449 (2008) ("While the current legal regime typically focuses on breaking down barriers to entry or opportunity, Title VII also has a history of broad remedial power over discrimination in the workplace.").
25. 42 U.S.C. § 2000e-5(g)(1) (2006).
26. *Id.* § 1981a(a)(1).

not feasible.[27] It also provides non-monetary relief, permitting injunctive relief and declaratory relief,[28] as well as affirmative action in appropriate cases to address an employer's structural discrimination.[29]

Title VII addresses nearly all discrimination-based workplace harms.[30] It bars discrimination, allows wide recovery for discriminatory conduct, and encourages challenges to unlawful employment practices by barring retaliation for challenging such practices. Title VII covers myriad actors and activities in the workplace, aiming at small and large issues. Drawn with a wide reach, Title VII has been amended to remain that way. That breadth allows for Title VII's goal—workplace equality—to be met through aggressive enforcement.

Nonetheless, courts can limit Title VII recovery and restrict its scope. Some courts have suggested that some discrimination that appears to violate Title VII may not be compensable because it is too insignificant to be actionable.[31] Similarly, though Title VII bars retaliation against those who have challenged an unlawful employment practice, the Court has indicated that some forms of retaliation may not be compensable.[32] Courts have the final say on Title VII and can limit it as they see fit.[33] Unquestionably, the Supreme Court has limited Title VII in recent years.

## II. NOTES ON THE SUPREME COURT'S RECENT TITLE VII JURISPRUDENCE

In the past several years, the Supreme Court has decided various Title VII cases in ways that may affect Title VII's effectiveness. Some of the cases provide employers with additional latitude to

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27. *Id.*

28. *Id.* § 2000e-5(g).

29. *Id.* § 2000e-5(g)(1). *See generally* Local 28 of Sheet Metal Workers' Int'l Assoc. v. EEOC, 478 U.S. 421 (1986).

30. There is a line between workplace behavior that is covered by Title VII and workplace behavior that must be tolerated. *See* Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 79 (1998) (noting that Title VII does not cover all workplace harm).

31. *See generally* Theresa M. Beiner, *Do Reindeer Games Count as Terms, Conditions or Privileges of Employment Under Title VII?*, 37 B.C. L. REV. 643 (1996); Rebecca Hanner White, *De Minimis Discrimination*, 47 EMORY L.J. 1121, 1122 (1998).

32. For a discussion of the limitations of Title VII retaliation, see Henry L. Chambers, Jr., *The Cost of Non-Compensable Workplace Harm*, 8 FIU L. REV. 317, 329–31 (2013).

33. The Supreme Court is the final interpreter of Title VII. *See, e.g.*, Univ. of Tex. Sw. Med. Ctr. v. Nassar, 133 S. Ct. 2517 (2013).

structure the workplace and avoid Title VII liability. Other cases narrow Title VII's effect in substantive areas such as disparate impact and retaliation. Others install procedural impediments that may limit Title VII recovery. When considered together, the cases may significantly restrict Title VII's reach.

*A. Employer Latitude*

The Court has gradually limited protections for employees under Title VII by providing employers increasing latitude to structure the workplace in ways that may facilitate discrimination. Title VII was designed to restrict the employer's ability to discriminate but was not designed to completely eliminate employer autonomy.[34] However, when employer autonomy intersects with or leads to discrimination, Title VII's prohibition on discrimination ought to prevail. Nonetheless, the Supreme Court has been subtly allowing employer prerogative to override employment discrimination statutes by allowing employers to structure their actions to avoid liability or by removing coverage for decisions that the Court believes ought to be within the employer's discretion. This may affect how well Title VII meets its overarching objectives.

In *Vance v. Ball State University*, the Supreme Court addressed who could be considered a supervisor for purposes of Title VII hostile work environment (HWE) harassment.[35] The issue is important because a supervisor can trigger HWE liability more easily than a non-supervisor.[36] The Court defined who is a "supervisor" fairly narrowly, limiting supervisory status for HWE harassment purposes to workers who can take significant, tangible employment actions against other employees.[37] Restricting supervisory status so narrowly potentially limits recovery for HWE harassment. In the process, the Court provided a roadmap for employers to restrict the workers who can be deemed supervisors for HWE harassment purposes, potentially narrowing liability for such harassment even further.

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34. That Title VII applies to employers with 15 or more employees suggests that many small employers ought to retain the autonomy to run their businesses as they wish. *See* 42 U.S.C. § 2000e (2006).

35. 133 S. Ct. 2434 (2013).

36. *See* Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 764–65 (1998).

37. *Vance*, 133 S. Ct. at 2443 (holding that for purposes of hostile work environment harassment, a supervisor is an employee who can "effect 'a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits'").

HWE harassment occurs when an employee is subject to harassment that is significant enough to alter the employee's terms, conditions, or privileges of employment but causes no tangible job detriment.[38] When a supervisor is responsible for HWE harassment, the employer is liable for the harassment unless it can prove a two-part affirmative defense.[39] The affirmative defense requires that the employer prove that it reasonably attempted to address or remedy the harassment and that the employee unreasonably failed to attempt to avoid the harm from the harassment.[40] Conversely, when a non-supervisor is responsible for HWE harassment, the employer is liable if it was negligent in allowing the harassment to occur.[41] Employer liability for coworker harassment is more limited than it is for supervisor harassment. Consequently, whether a coworker is a supervisor or not matters.

The *Vance* Court analyzed whether a harasser is a supervisor from the employer's perspective and narrowly construed who is a supervisor by focusing on the specific tasks that a supervisor performs.[42] The Court abandoned common definitions of "supervisor," focusing on defining "supervisor" for the specific purpose of determining when the employer should be liable for HWE harassment.[43] In searching for a definition of "supervisor" that could readily distinguish a supervisor from a coworker, the Court suggested that such a simple distinction was both necessary and possible to make in these circumstances.[44] The Court ignored the more nuanced definition of "supervisor" that the EEOC had developed.[45] The Court's quest yielded a limited definition of

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38. For a general discussion of quid pro quo and hostile work environment harassment, see Henry L. Chambers, Jr., *(Un)Welcome Conduct and the Sexually Hostile Environment*, 53 ALA. L. REV. 733, 740–43 (2002).

39. *See Burlington Indus., Inc.*, 524 U.S. at 764–65.

40. *See id.* at 765.

41. *See Vance*, 133 S. Ct. at 2452.

42. *See id.* at 2443.

43. *Id.* at 2444 ("In general usage, the term 'supervisor' lacks a sufficiently specific meaning to be helpful for present purposes.").

44. *Id.* at 2443–44 (discussing the need for a simple definition of "supervisor" consistent with existing HWE harassment doctrine).

45. *Id.* at 2443 ("Other courts have substantially followed the more open-ended approach advocated by the EEOC's Enforcement Guidance, which ties supervisor status to the ability to exercise significant direction over another's daily work."). Unfortunately, the Court often does not defer to the EEOC's judgment on employment discrimination matters. *See* Melissa Hart, *Skepticism and Expertise: The Supreme Court and The EEOC*, 74 FORDHAM L. REV. 1937, 1937 (2006) ("In the area of federal antidiscrimination law, the U.S. Supreme Court often prefers to 'chart its own course' rather than to defer to Equal Employment Opportunity Commission ('EEOC' or 'Commission') regulations and guidance interpreting these laws.").

"supervisor" that focuses on the supervisor/coworker's ability to hire, fire, or take major job actions against the employee.[46]

The *Vance* Court suggested that its position is consistent with the structure of sexual harassment liability and the affirmative defense.[47] Indeed, the Court noted that it ignored colloquial definitions of "supervisor" because it was attempting to define the word in the context of existing HWE doctrine.[48] However, the Court has mixed two different concepts. The Court's desire for a clear definition of "supervisor" morphed into the desire for an easy-to-apply definition of "supervisor" and resulted in a limited definition of "supervisor." The definition the Court adopted may be easier to apply but may not be particularly related to the original issue underlying the affirmative defense—when an employer should be responsible for HWE harassment.[49] The affirmative defense to HWE liability exists to define when the employer should be responsible for the HWE harassment, e.g., when the act of the supervisor should be considered the act of the employer or when the worker responsible has been aided by his or her position as the employer's agent.[50] Limiting who is a supervisor by using an easy-to-apply definition of "supervisor" may limit liability, but it is not clear that such limitation is more consistent with the purpose of the affirmative defense than using a somewhat less clear definition.[51] Indeed, focusing on the issue from the employee's perspective rather than the employer's perspective, as the Court did, may be sensible.

The *Vance* Court halfheartedly considered who could be deemed a supervisor from the employee's perspective in recognizing the effect that a putative supervisor/coworker could have on the employee's working conditions.[52] However, after noting that the supervisor/coworker in *Vance* could exercise effective control over Vance's work atmosphere and make the work atmosphere very uncomfortable, the Court noted that a non-supervisory coworker

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46. *Vance*, 133 S. Ct. at 2443.

47. *Id.* at 2441.

48. *Id.* at 2443 (noting that supervisor status is to be determined in the shadow of *Ellerth* and *Faragher*, the two cases that created the HWE affirmative defense and "presuppose[d] a clear distinction between supervisors and co-workers").

49. *Id.* at 2446 ("[T]he term was adopted by this Court in *Ellerth* and *Faragher* as a label for the class of employees whose misconduct may give rise to vicarious employer liability.").

50. *Id.* at 2441.

51. The Court would clearly disagree, suggesting that the *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998), and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), decisions specifically focus on limiting supervisors to those with significant power over tangible employment benefits. *See Vance*, 133 S. Ct. at 2448.

52. *Id.*

could do the same.[53] Rather than analyze the issue more deeply, the Court refocused the inquiry on whether the supervisor/coworker had control over major job decisions. However, how an employee experiences the supervisor/coworker's power in the workplace would also seem relevant to whether the supervisor/coworker was aided in harassing the employee by the power given to him or her by the employer—a key issue according to the *Vance* Court.[54] Whether the supervisor/coworker could exercise coercive power over the employee would seem to be a reasonable test for whether he or she has supervisory power under the relevant circumstances. That is, rather than asking whether the putative supervisor in *Vance* could hire and fire, the Court could have asked whether the employee could treat the putative supervisor just like another coworker without any repercussions related to the employee's job duties. If so, the supervisor/coworker is a coworker; if not, the supervisor/coworker is a supervisor for HWE purposes. Unfortunately, the *Vance* Court did not engage these issues in extended fashion.

Ironically, the HWE affirmative defense could resolve the issue simply. The affirmative defense requires that the employer reasonably attempt to prevent or stop the harassment and that the employee unreasonably fail to prevent or avoid the harassment.[55] If the employer has a reasonable reporting system, the employee who believes he or she is being harassed by a supervisor will presumably use the reporting system or lose the case because the affirmative defense has been proven. However, by determining that the putative supervisor in *Vance* was a mere coworker, the affirmative defense was deemed irrelevant.[56] In the process, the *Vance* Court allowed an employer to structure the application of Title VII by providing diffuse supervisory authority that may limit the employer's liability.[57]

The Court's willingness to give employers additional latitude is a serious issue. When an employer is allowed to exercise too much authority in deciding an issue that is fundamental to liability, the employer effectively controls Title VII's scope. *Vance* is not the only recent case in which the Court has allowed increased employer latitude. The Court allowed broad employer discretion in *Hosanna-*

53. *Id.* ("The ability to direct another employee's tasks is simply not sufficient. Employees with such powers are certainly capable of creating intolerable work environments, but so are many other co-workers.").

54. *Id.* at 2441.

55. *Id.* at 2439.

56. *Id.* at 2453.

57. The case is generally pro-employer. *See id.* at 2463 (Ginsburg, J., dissenting).

*Tabor Lutheran Church & School v. EEOC*.[58] Though this case is not a Title VII case, it is an employment discrimination case that may affect Title VII doctrine.

In *Hosanna-Tabor*, the Court ruled that employees who are considered ministers by the church-related entities that employ them cannot sue their employers for employment discrimination.[59] The Court's decision flows from its recognition of a ministerial exception based on the First Amendment.[60] The Establishment and Free Exercise clauses of the First Amendment combine to allow churches to choose their own ministers without interference from government.[61] Exposing churches to possible liability from employment discrimination statutes from church pastors is considered interference by the government.[62] Though the basis for the exception is not particularly controversial, the exception can be applied broadly or narrowly.[63]

The *Hosanna-Tabor* Court provided the impetus for a possibly too broad interpretation of the ministerial exception. In that case, plaintiff Cheryl Perich was fired for threatening to file an Americans with Disabilities Act lawsuit against her employer, a Lutheran church school.[64] Perich had been a called teacher at the school, meaning that she had gone through religious training and had been called by the congregation to her position.[65] Before she was called, she had been a lay teacher at the same school.[66] During her tenure as a called teacher, Perich was diagnosed with narcolepsy and placed on medical leave.[67] She attempted to return to her position in the middle of the school year but was told that she had been replaced for the year by a lay teacher.[68] Perich persisted in attempting to return to her position and was eventually fired when she indicated that she planned to sue the school.[69] The EEOC sued on Perich's behalf, alleging retaliation by the school.[70] Perich eventually joined the suit as an intervenor.[71] The school moved for summary judgment, arguing that the ministerial exception shielded its actions from

58. 132 S. Ct. 694 (2012).
59. *Id.* at 710.
60. *Id.*
61. *Id.* at 702.
62. *See id.* at 709–10.
63. *Id.* at 705.
64. *Id.* at 700.
65. *Id.* at 699.
66. *Id.* at 700.
67. *Id.*
68. *Id.*
69. *Id.*
70. *Id.* at 701.
71. *Id.*

review and sanction.[72] The school won at the district court but lost at the U.S. Court of Appeals for the Sixth Circuit.[73] The Supreme Court reversed the Sixth Circuit and found for the school.[74] In ruling for the church school, the Court rejected the argument that the position at issue could be, and was in fact, filled by a lay person and, thus, was not subject to the ministerial exception.[75] The Court focused more on whether the church and school regarded Perich as a minister than on what the requirements of her position were.[76]

The broad discretion that a religious employer may exercise under *Hosanna-Tabor* is a major concern. The Court suggested that the case involved a church firing a minister.[77] Such a termination would clearly seem to be covered by the ministerial exception. However, the case can as easily be construed as involving a church school firing a teacher. Certainly, the congregation did vote to rescind Perich's call.[78] However, given that Perich's position had been filled by a lay teacher, i.e., Perich, before Perich was called and was filled by a lay teacher when Perich became ill, it is not clear that Perich had to retain her call to retain the position.[79] Perich clearly was a minister, and her skills and training as a minister certainly allowed her to function better in her role as a teacher at the school.[80] Whether Perich should have been considered a minister or a school teacher for purposes of the firing may be a contested question. However, giving the issue to the employer to decide effectively ends the discussion and does not provide a clear limit for the ministerial exception.

Under *Hosanna-Tabor*, a church school can fire a minister–teacher who is doing a job that a lay teacher can do. If a lay teacher is considered to be ministering to children at the church school, it is not clear that the lay teacher should not be considered a minister for purposes of the ministerial exception.[81] It is unclear whether *Hosanna-Tabor* limits how a church or church-related entity

72. *Id.*
73. *Id.* at 701–02.
74. *Id.* at 710.
75. *See id.* at 708–09.
76. *Id.* at 709 ("Because Perich was a minister within the meaning of the exception, the First Amendment requires dismissal of this employment discrimination suit against her religious employer.").
77. *Id.* at 699.
78. *Id.* at 700.
79. Perich originally requested reinstatement to her position as a called teacher but abandoned that relief. *See id.* at 709.
80. *See id.* at 707.
81. Churches often consider various employees to be ministers. *See, e.g.*, Cannata v. Catholic Diocese of Austin, 700 F.3d 169, 180 (5th Cir. 2012) (finding music director to be subject to ministerial exception).

determines who is a minister or what positions can be deemed ministerial and, therefore, subject to the ministerial exception. If a church-related employer can describe nearly all of its employees as ministers and the inquiry into the employer's good faith is limited, the employer's definition of who is a minister will govern in most situations.[82] It is possible, depending on how *Hosanna-Tabor* is read, that the Court believes that the First Amendment requires that religious employers have such latitude. Nonetheless, if a church-related entity does have such latitude, it has the power to restrict the scope of employment discrimination statutes significantly.

Providing additional employer latitude tends to narrow protection for workers. Whether *Vance* and *Hosanna-Tabor* will yield little or significant additional employer latitude is unclear. Other cases may blunt or reinforce employer latitude.[83] However, providing the possibility that employers may be able to manage their way out of Title VII liability limits Title VII's effectiveness.

### *B. Disparate Impact*

The Court's recent jurisprudence appears to narrow the application of disparate impact discrimination. That is troubling because disparate impact discrimination is core to Title VII's effectiveness. As suggested by the codification of disparate impact through the Civil Rights Act of 1991, Congress has consistently defended and championed the need for recompense for disparate impact discrimination.[84] Certainly, the Supreme Court recognizes that disparate impact cannot be judicially destroyed. However, the Court appears ready to continually chip away at disparate impact's effect, whether intentionally or unintentionally.

Disparate impact has been a part of Title VII doctrine since *Griggs v. Duke Power Co.* affirmed the existence of a disparate

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82. *See Hosanna-Tabor*, 132 S. Ct. at 710 (Thomas, J., concurring) (suggesting that courts should defer to the good faith of religious employers).

83. *See generally* AT&T v. Hulteen, 556 U.S. 701, 709–11 (2009) (allowing employer to decide whether to continue to use rule that perpetuated the effects of past lawful discrimination); Engquist v. Or. Dept. of Agric., 553 U.S. 591, 603 (2008) (noting support for allowing employer prerogative to fire based on irrelevant, but not unlawful, grounds). However, the Court restricted employer prerogatives in a non-Title VII employment discrimination case ruling that the contention that the Court rejected might have allowed an employer to shield itself from liability. *See* Staub v. Proctor Hosp., 131 S. Ct. 1186, 1193 (2011) (construing the Uniformed Services Employment and Reemployment Rights Act of 1994).

84. *See* 42 U.S.C. § 2000e-2(k) (2006).

impact cause of action in 1971.[85] The magnitude of the inclusion of disparate impact under Title VII cannot be overstated. The inclusion meant that Title VII was not limited to barring intentional discrimination.[86] The disparate impact cause of action allowed recovery for an employer's use of facially neutral rules that had a disproportionately negative impact on particular groups of employees.[87] Employers could defend the use of the relevant rule or employment practice on the grounds that business necessity required the rule.[88] However, the need for an employer to defend itself in a situation in which it had arguably not intentionally discriminated changed the dynamic of Title VII. Disparate impact liability limits the exercise of employer prerogative when use of that prerogative harms certain groups of employees.[89] More broadly, with the advent of disparate impact liability, Title VII bars unintentional discrimination that could effectively limit members of certain groups from advancing in the workplace.[90] Though disparate impact necessarily relates to group harm, its focus is not on making sure that groups do well under Title VII. Rather, disparate impact focuses on employment practices that are unnecessary to the running of an employer's business but harm members of certain groups in greater proportion than they harm members of other groups.[91]

The reach of disparate impact, and its focus on employment practices rather than group harm, became clear in *Connecticut v.*

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85. 401 U.S. 424 (1971). The disparate impact claim was not created as much as it was recognized by the Court.

86. However, some argue that disparate impact is a search for discriminatory motivation. *See* George Rutherglen, *Disparate Impact Under Title VII: An Objective Theory of Discrimination*, 73 VA. L. REV. 1297 (1987).

87. *See generally* Dothard v. Rawlinson, 433 U.S. 321 (1977) (reviewing the application of height and weight rules that excluded women from certain prison guard positions).

88. The absence of business necessity doomed the use of the rule. *See Griggs*, 401 U.S. at 431 ("The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited.").

89. The paring of prerogative was evident when employers were limited to giving employment tests that were job related. *See* Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975) (discussing when an employment test is sufficiently job related to overcome disparate impact); *see also* Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. § 1607 (2012) (providing guidelines to determine job-relatedness of employment tests).

90. *See Griggs*, 401 U.S. at 432.

91. *See id.* at 431–32. For a discussion of disparate impact within a few years of its codification by the Civil Rights Act of 1991, see Ronald Turner, *Thirty Years of Title VII's Regulatory Regime: Rights, Theories, and Realities*, 46 ALA. L. REV. 375, 447–49 (1995).

*Teal*.[92] In that case, the Court reviewed the defendant–employer's two-step promotion process.[93] The first step was a written test that created an eligibility list of workers who were qualified for promotion; it had a racially disparate impact.[94] The second step, during which the promotions were made using additional job-related factors, reversed the effect of the first step such that the group that was eventually promoted was as diverse as the original pool of workers who sought promotion and was more diverse than the pool of workers on the eligibility list.[95] The defendant–employer argued that no disparate impact prima facie case could be made and no disparate impact claim could succeed if its process as a whole did not yield a disproportionate impact, i.e., if those promoted were as racially diverse as those in the original pool for promotion.[96] The Court rejected that "bottom-line" defense, ruling that the use of any rule or employment practice that yields a disparate impact and is not backed by business necessity is inappropriate without regard to the results of the remainder of the process.[97] The *Teal* Court suggested that disparate impact focuses on the effect that a particular rule has. Presumably, had the first stage not been in place and the remainder of the process been kept the same, minorities could have been promoted at an even higher rate.[98] The *Teal* Court's effect on disparate impact doctrine was to bar the use of a rule that may limit the horizon of minority workers even if the rule is part of a process that produces demographically fair results.

However, the Court has not been a consistent supporter of a broad vision of disparate impact liability. The Court was not particularly solicitous of the disparate impact cause of action in *Wards Cove Packing Co., Inc. v. Atonio*.[99] *Wards Cove* was a fairly complex case that involved seasonal salmon cannery operations.[100] The defendant–employer treated cannery workers and non-cannery

92. 457 U.S. 440 (1982).
93. *Id.* at 443–44.
94. *Id.* at 443.
95. *See id.* at 444 (noting that the employer chose employees to be promoted from the eligibility list by considering "past work performance, recommendations of the candidates' supervisors and, to a lesser extent, seniority").
96. *See id.* at 441–43.
97. *Id.*
98. Of course, that might have triggered a disparate impact claim from disgruntled whites. For a discussion of such claims, see Charles A. Sullivan, *The World Turned Upside Down?: Disparate Impact Claims By White Males*, 98 NW. U. L. REV. 1505 (2004).
99. 490 U.S. 642 (1989).
100. *Id.* at 646.

workers differently.[101] Not only did cannery and non-cannery workers work under different conditions, they were hired differently and paid different wages.[102] The groups also had very different racial compositions, with the cannery workers having a much higher percentage of native minority workers than the non-cannery workers.[103] A number of cannery workers sued the employer claiming disparate treatment (intentional) and disparate impact discrimination.[104] The statistical evidence of disparate impact was limited to comparing the racial makeup of the cannery workers to the racial makeup of the non-cannery workers.[105] Of course, that comparison was irrelevant when comparing unskilled cannery workers to skilled non-cannery workers because the very different skills required for the different types of jobs created different pools of eligible workers for those jobs, possibly with very different racial makeups. However, the Court found the statistical evidence insufficient to support a disparate impact prima facie case even when unskilled non-cannery workers were compared to unskilled cannery workers.[106] The Court argued that such a comparison was relevant only if the unskilled cannery workers and the unskilled non-cannery workers were chosen from a similar labor pool, without explaining in much detail why the pools for unskilled cannery and non-cannery labor would be significantly different.[107] The Court also noted that the plaintiffs had to explain which specific employment practice caused the disparate impact. Plaintiffs could not rely on the disparate impact that resulted from an entire employment process in which several discrete rules were embedded.[108] In addition, the Court appeared to relax the business necessity standard from *Griggs*, allowing business necessity to be met with a reasonable justification for the rule.[109]

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101. *Id.* at 646–47. *See also* Saucedo, *supra* note 24, at 457–59 (discussing *Wards Cove* and suggesting that it was an essentially segregated workplace).

102. *Wards Cove Packing*, 490 U.S. at 646–47.

103. *Id.* at 647–48.

104. *Id.*

105. *See id.* at 650–51; *see also* Saucedo, *supra* note 24, at 457 ("Filipino, Hispanic, Asian, and Eskimo employees held the unstable, lower-paying, and less desirable cannery jobs. Anglos held the stable and more desirable noncannery jobs.").

106. *See Wards Cove Packing*, 490 U.S. at 653.

107. *See id.* (noting that the pool of unskilled cannery workers may be different than the pool of unskilled non-cannery workers even though the skills for the jobs may be "somewhat fungible").

108. *Id.* at 656–57.

109. *Id.* at 659 (noting that "a mere insubstantial justification . . . will not suffice" to meet the business necessity standard, but that the employer rule need not "be 'essential' or 'indispensable' to the employer's business").

*Wards Cove* was a blow to disparate impact doctrine. Though the Court did not question the existence of the disparate impact cause of action, it made the cause of action far more difficult to win. The proof that the Court appeared to require just to make a prima facie case appeared significant; the proof necessary to win would be far more substantial. Given how the Court structured the proof in *Wards Cove*, the disparate impact claim appeared to be in serious trouble. Congress responded to *Wards Cove* with the Civil Rights Act of 1991.[110]

The 1991 Act redefined the disparate impact cause of action in a manner that reversed *Wards Cove* in significant measure.[111] The disparate impact cause of action was explicitly codified in the 1991 Act, with its contours made plain.[112] Under the 1991 Act, an unlawful employment practice has been proven when the plaintiff proves a disparate impact and the employer cannot prove that the rule or practice involved is job related or based on a business necessity.[113] An unlawful employment practice has been similarly proven if the plaintiff presented the employer with an alternative employment practice with less discriminatory effect than the rule at issue and the employer declined to adopt the alternative practice.[114] The plaintiff is also no longer required to identify a specific employment practice as the cause of a disparate impact in all instances. If a broad employment practice is composed of several rules or practices that are difficult to disentangle, the plaintiff may analyze the broad practice as a single employment practice for disparate impact purposes.[115] The 1991 Act made clear that disparate impact is an important part of Title VII that would not be severely limited based on the proof structures that the Supreme Court constructed.[116] Congress's quick response to a problematic case suggests that it believed that Title VII remained a primary avenue to provide equality in the workplace and Title VII's effects should not be blunted by unnecessary procedural restrictions.

Almost two decades after Congress reaffirmed the disparate impact cause of action's place in the Title VII firmament through the 1991 Act, the Supreme Court muddied disparate impact's role in

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110. Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071.

111. *See* Saucedo, *supra* note 24, at 459 (noting that the 1991 Act corrected many of *Wards Cove*'s shortcomings).

112. *See* 42 U.S.C. § 2000e-2(k)(1) (2006).

113. *Id.* § 2000e-2(k)(1)(A)(i).

114. *Id.* § 2000e-2(k)(1)(A)(ii).

115. *Id.* § 2000e-2(k)(1)(B)(i).

116. For a discussion of the Civil Rights Act of 1991 as a reaction to *Wards Cove*, see Melissa Hart, *From Wards Cove to Ricci: Struggling Against the "Built-in Headwinds" of a Skeptical Court*, 46 WAKE FOREST L. REV. 261 (2011).

*Ricci v. DeStefano*.[117] Arguably, the Court implicitly questioned the theory of disparate impact discrimination. In *Ricci*, New Haven sought to select captains and lieutenants for its fire department.[118] The City gave a written test that counted for 60% of the score and an oral examination that counted for the remaining 40% of the score.[119] The tests had been developed by a firm with experience in developing such tests.[120] After the scores were calculated and the rank-order eligibility list was created, the City had to decide whether to certify the list and use the results to choose captains and lieutenants.[121] If the test results were used, the City's officer rank would not necessarily have become more diverse.[122] In addition, New Haven recognized that other testing procedures that the City had yet to try might yield a diverse group of officers.[123] The City had also been told that it would be sued by minority firefighters who would not be promoted if the list was certified.[124] Consequently, the City declined to certify the eligibility list.[125]

Firefighters who very likely would have been promoted had the list been used sued, claiming that the City engaged in intentional discrimination against them based on race.[126] The City defended the claim arguing that it could refuse to certify the eligibility list because use of the list would yield a disparate impact.[127] The Court found that the City's decision to decline to use the results of the test was intentional discrimination[128] and further ruled that such intentional discrimination could only be justified if the City had "a strong basis in evidence" to believe that it would be subject to liability had it not intentionally discriminated.[129] The Court explained that the City did not have a strong basis in evidence because the test appeared to be job related, i.e., a reasonable judge of merit for the positions at issue.[130] The Court then ruled that the plaintiffs were entitled to summary judgment against New Haven.[131]

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117. 557 U.S. 557 (2009).
118. *Id.* at 562.
119. *Id.* at 564.
120. *Id.*
121. *Id.* at 562–63.
122. *Id.* at 566.
123. *Id.* at 570–71.
124. *Id.* at 562.
125. *Id.* at 574.
126. *Id.* at 563.
127. *Id.* at 572–74.
128. *Id.* at 563.
129. *See id.* at 585.
130. *See id.* at 592 (suggesting no reason for New Haven to believe that the tests were not job related).
131. *See id.* at 593.

The *Ricci* Court's position is somewhat inconsistent with the long history of disparate impact as an integral part of Title VII. However, the opinion's harshness comes into full focus when one considers that the opinion suggested that the majority of the Court may not believe that disparate impact is a key part of Title VII's history. The Court appears to believe that disparate impact was not an original part of Title VII.[132] The Court suggested that the language of Title VII originally only covered disparate treatment, with the *Griggs* Court simply adding disparate impact to Title VII on its own.[133] Consequently, the language of the 1991 Act is the basis for disparate impact liability. Unfortunately, the Court may feel free to read the disparate impact cause of action codified in the 1991 Act narrowly, as it appears to believe that the 1991 Act is the only textual support for the disparate impact cause of action.[134] The Court's thinly veiled contempt for disparate impact helped convince it that an employer's concern about disparate impact is itself the near equivalent of disparate treatment, i.e., intentional discrimination against the group favored by the disparate impact. Unfortunately, the Court echoed its position in *Lewis v. City of Chicago*, a case addressing the claims of minority applicants for firefighting jobs in Chicago.[135] The Court's position is very worrisome if one believes that disparate impact discrimination must be actionable if Title VII is to eradicate barriers to workplace discrimination effectively.

The *Ricci* Court's hostility to Title VII disparate impact is ironic given that the Court imported a disparate impact claim into the Age Discrimination in Employment Act (ADEA) in *Smith v. City of Jackson*[136] when it could have fairly easily denied the existence of an ADEA disparate impact cause of action.[137] However, the Court's

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132. *Id.* at 577 ("The Civil Rights Act of 1964 did not include an express prohibition on policies or practices that produce a disparate impact."). *See also* Lewis v. City of Chicago, 560 U.S. 205, 211 (2010) ("As originally enacted, Title VII did not expressly prohibit employment practices that cause a disparate impact.").

133. *See Ricci*, 557 U.S. at 577–78 (noting that *Griggs* "interpreted the Act to prohibit, in some cases, employers' facially neutral practices that, in fact, are 'discriminatory in operation'"); *see also Lewis*, 560 U.S. at 211 (noting that *Griggs* interpreted Title VII to include disparate impact claims based on 42 U.S.C. § 2000e-2(a)(2)).

134. *See Ricci*, 557 U.S. at 578 ("Twenty years after *Griggs*, the Civil Rights Act of 1991, 105 Stat. 1071, was enacted. The Act included a provision codifying the prohibition on disparate-impact discrimination."); *see also Lewis*, 560 U.S. at 212 ("Two decades later, Congress codified the requirements of the 'disparate impact' claims *Griggs* had recognized.").

135. *Lewis*, 560 U.S. 205.

136. 544 U.S. 228, 236–37 (2005).

137. Indeed, the Court had expressed doubts about the existence of an ADEA disparate impact claim in *Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993).

position can be explained in two ways. First, the Court may have thought that disparate impact is a part of any discrimination scheme that does not strictly limit itself to intentional discrimination. Second, the nature and text of the ADEA may contemplate a disparate impact cause of action even if the language is not explicit. Of course, either of these explanations appears to fall flat given the *Ricci* Court's suggestion that disparate impact was Court made until the 1991 Act codified disparate impact.

However, the irony of a Court that seems solicitous of an ADEA disparate impact claim but hostile to a Title VII claim may fade away given how the Court has treated the ADEA claim.[138] The *Ricci* Court recognized the existence of a Title VII disparate impact claim but narrowed it. Similarly, the Court noted the existence of an ADEA disparate impact claim but narrowed it. The Court created the ADEA claim in *Smith* but gave it a narrow reading.[139] The Court then confirmed the claim in *Meacham v. Knolls Atomic Power Laboratory* but maintained its narrowness.[140] Indeed, the Court has suggested that the ADEA disparate impact claim is narrower than the Title VII disparate impact claim.[141]

The Court's disparate impact doctrine is strange when viewed through the lens of employer prerogative. Disparate impact claims arose and became prominent through cases in which employers gave tests or installed rules that had a disparate impact but could not be validated as being particularly job related.[142] Disparate impact doctrine rejected the employer's right to use a test that yields a disparate impact, unless the test was validated as job related.[143] *Ricci* appears to change that. After *Ricci*, an employer that gives a test is required to use the test results, even if the test yields a disparate impact, unless the employer can prove that the test is not job related.[144] That restricts the employer's prerogative to decline to use test results that yield a disparate impact. Oddly enough, an employer that gives a test and finds out that the test yields a disparate impact is not required to validate the test before using it. Rather, it may use the test results until someone challenges the validity of the test. Given the thrust of disparate impact—to limit the impact of facially

138. For a more detailed discussion of ADEA and Title VII disparate impact doctrine, see William R. Corbett, *Fixing Employment Discrimination Law*, 62 SMU L. REV. 81 (2009).

139. *See Smith*, 544 U.S. at 240–43.

140. 554 U.S. 84, 102 (2008).

141. *Id.* at 98.

142. *See, e.g.*, Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975).

143. *See, e.g.*, *id*; Griggs v. Duke Power Co., 401 U.S. 424, 435–36 (1971).

144. *See* Ricci v. DeStefano, 557 U.S. 557 (2009).

neutral rules that yield disproportionate harm to member of groups —this is surprising.

*Ricci* both expanded employer prerogative and limited it. It allows employers to create whatever tests they want to create, if they do so in good faith. However, it restricts how the employer may use or decline to use the test results. The *Ricci* Court would likely argue that Title VII requires that limitation because New Haven wanted to decline to use the test results for a discriminatory reason. However, the issue is more complex than that because New Haven wanted a diverse group of commanders in its fire department. Certainly, it also wanted to test for the best people to fill those spots. However, when the City realized that following the test results would not create a diverse command and that there were other testing procedures that might help it create a diverse command, the city used its prerogative to decline to use test results that it believed to reflect talent inadequately.[145] The Court rejected that use of prerogative.[146]

Whether the Court is intentionally seeking to limit the effect of disparate impact or does not realize the implications of its decisions is unclear. However, if the trend continues with the Court treating cognizance of race or other characteristics as almost equal to disparate treatment, there could be significant problems for Title VII. Disparate impact has been a key part of Title VII since 1971 and acts to limit employer prerogative by making clear that rules that are not triggered by intentional discrimination may yet be unlawful. Narrowing that understanding is one more problem for Title VII's quest to eliminate all workplace barriers to equality.

### *C. Retaliation*

Protection against retaliation is a key part of Title VII. Without that protection, challenging employment discrimination would be nearly impossible. Indeed, the Court has inserted retaliation claims in other statutes where they did not explicitly exist because protection against retaliation was deemed necessary to protect the underlying right that was explicitly protected in the statute.[147] Without retaliation protection, employees would have a difficult time protecting their own employment, and very few would engage

145. *Id.* at 574.

146. *See id.* at 593.

147. *See, e.g.*, CBOCS West, Inc. v. Humphries, 553 U.S. 442 (2008) (finding retaliation cognizable under 42 U.S.C. § 1981 (2006)); Jackson v. Birmingham Bd. of Educ., 544 U.S. 167 (2005) (finding retaliation cognizable under Title IX private cause of action).

in actions that might protect the employment rights of others. Indeed, some argue that protection against retaliation is a necessary part of the Title VII enforcement scheme.[148]

The Court has treated Title VII retaliation claims somewhat similarly to how it has handled Title VII disparate impact claims. Both retaliation and disparate impact claims are explicitly recognized in Title VII, so the Court recognizes them.[149] Similarly, the Court has been somewhat solicitous of retaliation claims outside of Title VII, as it has with disparate impact claims outside of Title VII. Indeed, the Court has been reasonably supportive of Title VII retaliation claims, even supporting wider coverage for Title VII retaliation than some appellate courts initially provided.[150] However, as with disparate impact claims, the Court has narrowed the retaliation cause of action with procedural roadblocks and substantive doctrines that will make recovery under retaliation less likely than it arguably should be.

Title VII bars discriminating against an individual who has formally or informally participated in challenging an employment practice that the individual reasonably believes is an unlawful employment practice.[151] The retaliation cause of action that stems from the prohibition is simple. It requires that the plaintiff prove that he or she engaged in protected activity and that the employer discriminated against the plaintiff because of that protected activity.[152] Of course, the Court has interpreted elements of the

148. *See* Deborah L. Brake & Joanna L. Grossman, *The Failure of Title VII as a Rights-Claiming System*, 86 N.C. L. REV. 859, 863 (2008) ("A successful rights-claiming system must respond to employees' needs at both ends of the rights-claiming process, enabling and encouraging employees whose rights are violated to come forward and protecting them from possible retaliation when they do.").

149. *See* 42 U.S.C. §§ 2000e-2(k), 2000e-3(a) (2006).

150. *See* Crawford v. Metro. Gov't of Nashville and Davidson Cnty., Tenn., 555 U.S. 271, 273 (2009) (broadening retaliation protection in holding retaliation "protection extends to an employee who speaks out about discrimination not on her own initiative, but in answering questions during an employer's internal investigation").

151. *See* § 2000e-3(a) ("It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.").

152. *See* Fuhr v. Hazel Park Sch. Dist., 710 F.3d 668, 674 (6th Cir. 2013) ("The [retaliation] *prima facie* case consists of four elements: (1) the plaintiff engaged in activity protected under Title VII; (2) plaintiff's exercise of her protected rights was known to defendant; (3) an adverse employment action was subsequently taken against the employee or the employee was subjected to severe or pervasive retaliatory harassment by a supervisor; and (4) there was a causal

cause of action, including what constitutes causation and what behavior qualifies as discrimination. Each interpretive step provides the Court with an opportunity to narrow the retaliation cause of action.

The causation standard that the Court applied in *University of Texas Southwestern Medical Center v. Nassar* narrowed the retaliation cause of action.[153] In *Nassar*, the Court ruled that the but-for causation standard that applies in ADEA non-retaliation cases should apply in Title VII retaliation cases.[154] The decision is important, in part, because proving that retaliation is the but-for cause of an employment action is the most difficult form of causation to prove. However, how and why the Court decided to apply an ADEA standard to a Title VII retaliation case is just as important. The Court's approach suggests a reluctance to expand Title VII coverage.

The *Nassar* Court considered the main issue that it resolved to be a causation issue.[155] However, it could have considered the issue to be an evidentiary or substantive issue related to defining the substance of the retaliation claim. At base, the *Nassar* Court had three options for deciding the causation issue. It could have decided that the but-for causation standard—a standard that arguably had not applied to Title VII causes of action since before *Price Waterhouse v. Hopkins* was decided in 1989—should apply to Title VII retaliation cases.[156] It could have decided that the *Price Waterhouse* mixed-motives structure—the causation standard in place before the Civil Rights Act of 1991—should apply to Title VII retaliation claims. Lastly, it could have decided that the motiving factor test—in place for Title VII claims other than retaliation under the Civil Rights Act of 1991—should define the substance of Title VII retaliation claims.[157] The motivating factor test defines the substance of an unlawful employment practice under Title VII and subsumes a causation standard that is more relaxed than but-for causation. The *Nassar* Court chose the first path.

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connection between the protected activity and the adverse employment action or harassment."); Hoyle v. Freightliner, LLC, 650 F.3d 321, 337 (4th Cir. 2011) ("To succeed on a retaliation claim, a plaintiff must prove that (1) she engaged in a protected activity, (2) the employer acted adversely against her, and (3) there was a causal connection between the protected activity and the asserted adverse action.").

153. 133 S. Ct. 2517 (2013).

154. *Id.* at 2534.

155. *Id.* at 2522.

156. 490 U.S. 228 (1989).

157. 42 U.S.C. § 2000e-2(m) (2006).

Title VII does not specify a causation standard. It merely requires that the plaintiff be harmed because of the employee's race, color, sex, religion, or national origin in status-based cases or because the employee engaged in protected activity in retaliation cases.[158] The causation standard that the Court chose—but-for causation—is a common tort causation standard. It requires that a fact finder determine that but for the action taken by the defendant, the relevant harm would not have occurred.[159] In the context of a standard Title VII case, but-for causation requires that a plaintiff prove that but for the defendant's discriminatory animus, the plaintiff would not have suffered harm. That can be difficult to prove when the employer claims that a legitimate reason explains the adverse job action at issue and the employer has sole access to the reasons an adverse job action was taken. Nonetheless, the but-for standard arguably applied to Title VII cases decided before *Price Waterhouse v. Hopkins*.[160]

In *Price Waterhouse*, the Supreme Court decided that but-for causation was not the appropriate causation standard in all situations and causation might be satisfied by something less than proof of but-for causation in some situations.[161] In that case, at issue was whether the plaintiff was the subject of sex discrimination when the defendant considered her for partnership.[162] Evidence had been presented that partners had engaged in sex stereotyping and provided sex-influenced evaluations during the process.[163] However, evidence had also been presented that there were legitimate reasons for the plaintiff to have been denied partnership.[164] The Court determined that when evidence was presented that could directly support the contention that sex had been considered when an employment decision was made, shifting the burden of proof to the employer to prove that it would have made the same decision had it not considered the employee's sex was sensible.[165] This is a mixed-

158. *See id.* §§ 2000e-2(a), 2000e-3(a).

159. *See Nassar*, 133 S. Ct. at 2525.

160. *Price Waterhouse*, 490 U.S. 228.

161. The various justices who wrote opinions in *Price Waterhouse* advocated for four different causation standards. For a discussion of *Price Waterhouse*, see Henry L. Chambers, Jr., *The Effect of Eliminating Distinctions Among Title VII Disparate Treatment Cases*, 57 SMU L. REV. 83, 89–92 (2004).

162. *Price Waterhouse*, 490 U.S. at 231–32.

163. *Id.* at 234–35. *See also* Melissa Hart & Paul M. Secunda, *A Matter of Context: Social Framework Evidence in Employment Discrimination Class Actions*, 78 FORDHAM L. REV. 37, 45–46 (2009) (discussing evidence presented in *Price Waterhouse* and social framework theory).

164. *Price Waterhouse*, 490 U.S. at 234.

165. *Id.* at 258 ("We hold that when a plaintiff in a Title VII case proves that her gender played a motivating part in an employment decision, the defendant may

motives standard of proof.[166] The focus in a mixed-motives case is whether a plaintiff has presented sufficient evidence to switch the burden of proof to the employer. This standard appeared short-lived. In the wake of *Price Waterhouse*, the Civil Rights Act of 1991 upended the notion of mixed motives as a proof issue when it inserted the motivating factor test into Title VII.[167]

The motivating factor test deems the use of an illegitimate factor, such as sex, as a motivating factor in employment decision-making to be an unlawful employment practice.[168] The motivating factor test is not strictly a causation test; it is a substantive rule. It defines when an unlawful employment practice has occurred and creates liability at the moment sex or another illegitimate factor motivates an adverse employment decision, whether or not the illegitimate factor is a but-for cause of the employment decision.[169] The 1991 Act states that there will be no recovery for substantive harm if the employer can prove that it would have taken the same employment action without the unlawful consideration of the illegitimate factor, i.e., if it can prove that the illegitimate factor was not a but-for cause of the adverse employment action.[170] In that circumstance, the plaintiff may only receive injunctive or declaratory relief and may only recover costs and fees.[171] The motivating factor test codifies that Title VII is violated when discrimination plays a role in a process, not solely when discrimination is a but-for cause of harm to the employee's employment. However, the rule is thought to be a causation test because it displaces the but-for rule—a clear causation test.

Given the development of causation doctrine under Title VII, the *Nassar* Court could have followed the reasoning that prior Courts had used and concluded that the motivating factor test should apply to Title VII retaliation claims. Instead, it decided to rethink causation and installed the but-for causation standard into the Title VII retaliation cause of action. The Court's choice to decline to

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avoid a finding of liability only by proving by a preponderance of the evidence that it would have made the same decision even if it had not taken the plaintiff's gender into account.") (plurality opinion).

166. *Id.* at 232 ("We granted certiorari to resolve a conflict among the Courts of Appeals concerning the respective burdens of proof of a defendant and plaintiff in a suit under Title VII when it has been shown that an employment decision resulted from a mixture of legitimate and illegitimate motives.").

167. *See* 42 U.S.C. § 2000e-2(m) (2006).

168. *See id.*

169. *See id.* § 2000e-5(g)(2)(B).

170. *Id.*

171. *Id.* § 2000e-5(g)(2)(B)(i).

apply the motivating factor test to the retaliation cause of action was not shocking.[172] The Court had rethought causation in *Gross v. FBL Financial Services, Inc.*[173] Consequently, though *Gross* was an ADEA case, the Court's attempt to rethink causation in a Title VII retaliation case is not startling.[174] However, the reason that the Court decided to ignore both the motivating factor test and the *Price Waterhouse* structure to settle on but-for causation for Title VII retaliation claims is very surprising.

The Court rejected the motivating factor test for the retaliation claim and found that the motivating factor test is embedded in a section of Title VII that only applies to status-based discrimination claims.[175] Given that, the Court found that the motivating factor test could not apply to the retaliation claim.[176] To some, the reasoning is not convincing, but it could be theoretically sound if one takes a pure clause-based vision of causation.

The *Nassar* Court's reasoning for bypassing the *Price Waterhouse* structure is more troubling. The Court treated the causation issue as though it were a matter of first impression.[177] The Court might argue that causation under the Title VII retaliation claim was a matter of first impression for the Supreme Court. However, that is not convincing. Causation is about how to interpret the term "because of." That term applies to both the retaliation claim and the status-based claim. Unless the term is supposed to mean something different in one part of the statute than it means in another part of the statute, the Court should not have acted as though it was writing on a blank slate.

The Court resolved the issue by arguing that the *Price Waterhouse* structure had been completely removed from Title VII doctrine by the 1991 Act.[178] The Court appeared to suggest that the 1991 Act removed *Price Waterhouse* from the entirety of Title VII because the 1991 Act codified a test that was different from the

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172. There are reasons why the Court might not apply the motivating factor test. For a discussion of the topic in depth, see Lawrence D. Rosenthal, *A Lack of "Motivation," or Sound Legal Reasoning? Why Most Courts Are Not Applying Either* Price Waterhouse*'s or the 1991 Civil Rights Act's Motivating-Factor Analysis to Title VII Retaliation Claims in a Post-*Gross *World (But Should)*, 64 ALA. L. REV. 1067 (2013) (discussing how Title VII retaliation claims should be analyzed).

173. 557 U.S. 167 (2009).

174. *See* Chambers, *supra* note 3, at 592 (noting the Court's willingness to rethink basic employment discrimination doctrine).

175. *See* Univ. of Tex. Sw. Med. Ctr. v. Nassar, 133 S. Ct. 2517, 2528–29 (2013).

176. *Id.* at 2534.

177. *Id.* at 2526–27.

178. *See id.* at 2534.

*Price Waterhouse* structure. That suggestion might seem reasonable had the 1991 Act altered *Price Waterhouse* because Congress wanted a causation standard that better resembled but-for causation. However, the motivating factor test provides a standard that is more relaxed regarding causation than the *Price Waterhouse* standard.[179] Consequently, the Court appears to argue that Congress intended to, or simply did, install the motivating factor test so that it would only apply to status-based claims and destroyed the more relaxed *Price Waterhouse* standard for retaliation claims so that those claims would be governed by a stricter but-for causation standard. The Supreme Court may intend for that to be the case, but it is unlikely that Congress intended for that to be the effect of the 1991 Act.

Once the Court determined that the motivating factor test and *Price Waterhouse* were not necessarily applicable to the Title VII retaliation claim, the Court could rethink causation. Once the Court rethought causation freely, it could adopt recent cases that had considered causation issues. In *Gross*, the Court considered causation in the context of the ADEA status-based cause of action and determined that but-for causation applied.[180] The *Nassar* Court borrowed the reasoning from *Gross* and installed but-for causation as its interpretation of what "because of" means for Title VII retaliation cases.[181] That was the Court's path to narrow Title VII retaliation claims.

Even though the Court acknowledged—as it had to—that the retaliation claim is a legitimate cause of action, it narrowed the cause of action when it logically could have made it broader. In deciding *Nassar*, the Supreme Court seemed willing to go only as far as Title VII explicitly allowed and showed no deference to prior Courts that had thought about the causation issue. That willingness to rethink a basic aspect of Title VII is troublesome, given the Court's apparent hostility to parts of Title VII.

Even in Title VII retaliation cases where the Court appears to expand Title VII coverage, it tends to provide an avenue to limit the eventual coverage. In *Thompson v. North American Stainless, LP*, the Court broadened the coverage of Title VII's retaliation provision by allowing third-party retaliation claims.[182] In that case, the employer supposedly retaliated against the plaintiff's fiancé, who had filed a sex discrimination charge against the employer, by firing

179. *See id.* (noting that the but-for standard is more demanding than the motivating factor standard).

180. Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 176 (2009).

181. *Nassar*, 133 S. Ct. at 2527–28.

182. 131 S. Ct. 863, 870 (2011).

the plaintiff.[183] The Court ruled that the plaintiff could sue under Title VII.[184] This arguably expanded Title VII retaliation protection. Title VII bars retaliation when an employee has formally or informally challenged employer behavior that the employee reasonably believed is an unlawful employment practice.[185] The plaintiff's fiancé had engaged in behavior that would trigger retaliation protection for her, but the plaintiff had not.[186] Consequently, the bar on retaliation arguably did not protect him. However, the Court found that the plaintiff was an aggrieved person under Title VII who could recover for any unlawful employment practice that harmed him.[187] The retaliation against the plaintiff's fiancé—the plaintiff's termination—was an unlawful employment practice that harmed the plaintiff.[188]

The *Thompson* Court's decision on third-party retaliation expands Title VII coverage. However, the Court noted that actionable retaliation exists only when a reasonable employee would be dissuaded from engaging in protected activity.[189] That left the scope of liability for retaliation open. The Court noted that the firing of a close family member would almost always reasonably dissuade an employee but noted that the infliction of "a milder reprisal on a mere acquaintance will almost never do so."[190] To be clear, the question is not whether the mild reprisal or the firing was retaliatory. The question is whether the clear retaliation against a mere acquaintance would have dissuaded the employee from engaging in the protected activity. That is not the obvious import of the text of Title VII's retaliation provision. Rather, it is the result of the Court's dissuasion standard that stemmed from its interpretation of the retaliation provision.[191]

Additional doctrines narrow the retaliation provision.[192] For example, the Court's temporal proximity doctrine requires that the employee's protected activity and the employer's adverse employment action be fairly close in time, though the retaliation clause has no such requirement.[193] Similarly, the Court allows

183. *Id.* at 867.
184. *Id.* at 870.
185. 42 U.S.C. § 2000e-3(a) (2006).
186. *Thompson*, 131 S. Ct. at 867.
187. *Id.* at 870.
188. *Id.*
189. *Id.* at 868.
190. *Id.*
191. *See* Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53 (2006).
192. *See* Brake & Grossman, *supra* note 148, at 864 (suggesting that Title VII lacks sufficient practical protection from retaliation).
193. *See* Clark Cnty. Sch. Dist. v. Breeden, 532 U.S. 268, 273 (2001) (discussing temporal proximity). For an in-depth discussion of temporal proximity

plaintiffs who reasonably believe that they are challenging an unlawful employment practice to sue an employer.[194] However, it is unclear how much that doctrine protects plaintiffs.[195] The Court and other federal courts do not appear hostile to retaliation cases.[196] However, the roadblocks that they are placing in front of retaliation plaintiffs are no less effective than if they were motivated by hostility. For those who believe that protection against retaliation is absolutely necessary to a functioning Title VII, this is very problematic.

*D. Procedural Issues*

There are procedural issues, some specific to Title VII and others not specific to Title VII, that may narrow the opportunity for Title VII plaintiffs to recover. The Court has tightened pleading standards. Courts continue to encourage summary judgment. Class actions may not be as available as they have been in the past. If the Court continues to encourage such limitations, the possibility that Title VII will continue to live up to its potential becomes less likely.[197]

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in Title VII cases, see Troy B. Daniels & Richard A. Bales, *Plus at Pretext: Resolving the Split Regarding the Sufficiency of Temporal Proximity Evidence in Title VII Retaliation Cases*, 44 GONZ. L. REV. 493 (2008).

194. *See, e.g.*, Kelly v. Howard I. Shapiro & Assocs. Consulting Eng'rs, P.C., 716 F.3d 10, 14–15 (2d Cir. 2013); *see also* Royal v. CCC & R Tres Arboles, LLC., 736 F.3d 396, 400–01 (5th Cir. 2013) (discussing reasonable belief).

195. For an in-depth discussion of the value of the reasonable belief doctrine, see Richard Moberly, *The Supreme Court's Antiretaliation Principle*, 61 CASE W. RES. L. REV. 375 (2010).

196. Indeed, the Court has been generous to retaliation claims in situations where it need not have been. *See* Kasten v. Saint-Gobain Performance Plastics Corp., 131 S. Ct. 1325, 1336 (2011) (ruling that oral complaint satisfied requirement that plaintiff have "filed any complaint" under Fair Labor Standards Act).

197. An additional issue that relates to Title VII is the Court's approval of forced internal dispute resolution. It may be helpful to employer, but it can create an additional barrier to Title VII recovery. *See* Brake & Grossman, *supra* note 148, at 864 ("The increasing privatization of employment disputes—a recent trend noted by many scholars—adds to the severity and nature of the problems we identify. By channeling bias claims into internal dispute resolution processes, in lieu of or as a prerequisite to the pursuit of formal statutory remedies, employers have effectively added another layer of obstacles to the enforcement of employees' statutory rights."). Compulsory arbitration of claims has been a controversial issue for years. *See* Ronald Turner, *Compulsory Arbitration of Employment Discrimination Claims With Special Reference to the Three A's—Access, Adjudication, and Acceptability*, 31 WAKE FOREST L. REV. 231 (1996).

The Court has tightened pleading standards. Rather than allow pure notice pleading as in the past, the Court is now requiring plausible pleading.[198] Though the Court has yet to explicitly limit Title VII pleadings, that day may be coming.[199] Some might argue that a plaintiff who cannot meet a pleading standard has little chance to win. However, that may not be true. More importantly, the tightening of pleading standards may have the effect of requiring that Title VII plaintiffs be ready to litigate earlier in the process. Though that may sound appropriate, it may make Title VII litigation more costly for plaintiffs, and cases may be less likely to be brought. Unless costliness is a good proxy for the quality of a case, increasing the cost to litigate is not likely to increase the quality of the cases that are brought. If good Title VII cases are not brought, Title VII is less likely to serve its purposes.

Moreover, federal judges like summary judgment,[200] and even more so in employment discrimination cases than in other types of cases.[201] Whether this is because judges dislike employment discrimination cases more than other cases or whether employment discrimination cases are weaker than other cases is not clear.[202] However, the incidence of summary judgment is not in question.[203] At issue is whether summary judgment is stopping meritorious cases from being heard. If so, Title VII has very little chance to work as fully as it should. Given that the Supreme Court has shown no appetite for lessening the incidence of summary judgment, Title VII plaintiffs may have to bring higher-quality cases than other litigants to survive summary judgment. That may not have much effect on

198. *See* Ashcroft v. Iqbal, 556 U.S. 662 (2009); Twombly v. Bell Atl. Corp., 550 U.S. 644 (2007).

199. *See* Charles A. Sullivan, *Plausibly Pleading Employment Discrimination*, 52 WM. & MARY L. REV. 1613, 1621 (2011) ("Several scholars have warned that plausible pleading poses a particular threat to plaintiffs in employment discrimination cases.").

200. *See* Richard L. Steagall, *The Recent Explosion in Summary Judgments Entered by the Federal Courts Has Eliminated the Jury from the Judicial Power*, 33 S. ILL. U. L.J. 469 (2009).

201. *See* Hon. Mark W. Bennett, *Essay: From The "No Spittin', No Cussin' and No Summary Judgment" Days of Employment Discrimination Litigation to the "Defendant's Summary Judgment Affirmed Without Comment" Days: One Judge's Four-Decade Perspective*, 57 N.Y.L. SCH. L. REV. 685 (2012–2013).

202. Of course, weak, but winnable, cases should not be decided on summary judgment. *See* Henry L. Chambers, Jr., *Recapturing Summary Adjudication Principles in Disparate Treatment Cases*, 58 SMU L. REV. 103 (2005).

203. *See* Hon. Denny Chin, *Summary Judgment in Employment Discrimination Cases: A Judge's Perspective*, 57 N.Y.L. SCH. L. REV. 671, 672 (2012–2013) (noting that summary judgment is granted more often in employment cases than in other cases and discussing why).

actual judgments, depending on how high the bar for summary judgment should be.[204]

In addition, the Court continues to remake its class action doctrine. A serious discussion of that issue would take a substantial amount of space. However, a quick word about *Wal-Mart Stores, Inc. v. Dukes* is necessary.[205] In that case, the Court declined to certify a huge class of about 1.5 million women who were employees or former employees of Wal-Mart.[206] The class challenged how Wal-Mart promoted and paid its female workers.[207] The plaintiffs claimed that Wal-Mart gave substantial discretion to managers to use their judgment to make pay and promotion decisions and that the discretion yielded discriminatory decisions.[208] When combined with Wal-Mart's culture that may have been particularly susceptible to bias, the plaintiffs claimed that class certification was appropriate because the class members' claims met the commonality requirement.[209] The Court decided otherwise and decertified the class.[210]

The issue in *Wal-Mart* is not whether the case was wrongly decided but how the Court discussed the intersection of commonality and Title VII. The Court suggested that commonality was best understood as every class member having the same claim and the same style of recovery.[211] Though the Court loosened the standard to include situations in which all class members are subject to employer-wide bias, the Court noted that evidence that was deemed sufficient for class certification at the district court was not close to being sufficient to support class certification.[212] The district court may have been wrong about the evidence; however, it may be that the *Wal-Mart* Court is suggesting that the kind of evidence that has been sufficient to support class certification is no longer sufficient for the task.[213] That would be a change that may harm

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204. *See* Chambers, *supra* note 202, at 131–32.

205. 131 S. Ct. 2541 (2011).

206. *Id.* at 2561.

207. *Id.* at 2547.

208. *See id.* at 2554. Of course, the *Wal-Mart* Court recognized that subjective procedures could be subject to disparate impact analysis and class recovery. *Id.* (citing Watson v. Fort Worth Bank & Trust, 487 U.S. 977 (1988)). Nonetheless, the Court declined class certification in this case. *Id.* at 2561.

209. *See id.* at 2553.

210. *See id.* at 2561.

211. *See id.* at 2550–51.

212. *Id.* at 2554 (noting that proof was "worlds away from" what was necessary to support certification).

213. The Court rejected evidence regarding social framework theory, although it may have been doing more than that. *See* Hart & Secunda, *supra* note 163, at 67 ("The debate over admissibility of social framework testimony is one of a set of

Title VII's ability to maximize its effectiveness through class actions.[214]

## III. NEXT STEPS FOR TITLE VII?

The Supreme Court's approach to Title VII appears to be at odds with Title VII's original vision. Title VII provides broad protections against inappropriate decision-making and unjust decisions made by employers. Historically, Title VII has been read to expand opportunities for minority groups. The expansion has often stemmed from the recognition that Title VII could always be applied in a more just fashion.[215] Simply, Title VII doctrine followed Title VII's ideals.

However, some of the Supreme Court's recent cases have suggested that the Court will focus its interpretation of Title VII on its vision of the meaning of Title VII's text, even if that is inconsistent with Title VII's overall vision or the vision that Congress apparently had when it passed Title VII and its various amendments. Of course, the Court's vision is not completely at odds with prior doctrine. The Supreme Court may be hostile to some aspects of Title VII, but its recent decisions do not suggest that the Court plans to erase Title VII from the statute books. Indeed, the Court is not necessarily openly hostile to Title VII and equality. Rather, it has a particular vision of Title VII. The Court's interpretations may whittle Title VII coverage.

The Court is rethinking Title VII doctrines. It is justifying or declining to justify those doctrines in ways that are foreign to traditional Title VII thinking. The Court's position on disparate impact and how it relates to disparate treatment is instructive. The Court has taken disparate impact—a doctrine that has been treated as an extension of or companion to disparate treatment—and put it into serious tension with disparate treatment. It has equated the desire to avoid disparate impact with disparate treatment. If that line of thinking stands, harmonizing the two styles of discrimination may become difficult.

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arguments presented to courts about which view of Title VII—that requiring identifiable, invidious intent or that requiring a demonstration of systematic and obvious disadvantage—should prevail.").

214. For a suggestion regarding how the EEOC should respond to *Wal-Mart*, see Angela D. Morrison, Duke-*ing Out Pattern or Practice After* Wal-Mart*: The EEOC as Fist*, 63 AM. U. L. REV. 87 (2013).

215. *See, e.g.*, Griggs v. Duke Power Co., 401 U.S. 424 (1971).

Similarly, the Court is rethinking causation issues. The Court's decision to reach back past *Price Waterhouse* to apply but-for causation to a Title VII retaliation claim required the Court to reject its own Title VII doctrine to reach a strange result that some thought had been buried by the 1991 Civil Rights Act.[216] Given how important the causation standard is when litigating discrimination claims that can be difficult to prove, the Court's position is fraught with peril for Title VII plaintiffs. As important, the Court's willingness to ignore or willfully misunderstand Congress's suggestion, based on its adoption of the motivating factor test in the 1991 Act, that Title VII is violated when improper motives affect the decision-making process—not only when harm is actually visited upon the employee—is troubling. The Court's approach suggests a willingness to reinterpret any doctrine that has not been explicitly stated in Title VII.[217] Given this Court's generally skeptical outlook on Title VII, that does not bode well for Title VII's expansion to limits that will allow Title VII to serve its original function of promoting full equality in the workplace.

Even when the Court does not rethink fundamental doctrine, it demonstrates a willingness to narrow Title VII. It is not so much that specific cases are being decided incorrectly—though some are arguably being decided incorrectly—it is that the Court's overall trend leads away from a robustly enforced Title VII. For example, its approach to retaliation is to be generally solicitous of the cause of action.[218] However, the Court narrowed retaliation in a way that may not provide nearly as much protection for the employee as Title VII might suggest. Logically, the result of narrowing the retaliation claim will be to discourage employees from challenging unlawful employment practices. Given that the retaliation clause exists to support and encourage employees to challenge unlawful employment practices, the narrowing of the retaliation claim is not just problematic for the employee; it is problematic for Title VII and the workplace.

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216. *See supra* Part II.C.

217. *See* Corbett, *supra* note 2, at 693 (suggesting that if Congress wants uniformity in how employment discrimination doctrines are applied, it needs to provide uniformity through legislation); Michael C. Harper, *The Causation Standard in Federal Employment Law:* Gross v. FBL Financial Services, Inc., *and the Unfulfilled Promise of the Civil Rights Act of 1991*, 58 BUFF. L. REV. 69, 144–45 (2010) (noting that interpretive uniformity will have to come through legislation); Katz, *supra* note 3, at 889 (suggesting that if Congress wants the 1991 Act standard to apply to all employment discrimination causes of action, it will have to make that explicit).

218. *See supra* Part II.C.

However, the Court's most important move may have been to provide additional latitude to employers to structure the workplace and avoid Title VII liability.[219] Given that employers shape the workplace and its rules, providing additional latitude to the employer is likely to make the workplace less just. Usually, an employer can make the workplace more just, if it wants, without encouragement from Title VII. Indeed, Title VII tends to stop employers from making the workplace less just. Consequently, little reason exists to believe that more employer latitude will benefit employees or necessarily make the workplace more just.

If the current trend continues, Title VII may be whittled down to its core provisions. Disparate treatment claims, including sexual harassment claims, will not go away. However, they may become harder to win. Disparate impact claims will exist but in weakened form. Disparate impact might only cover clear rules that are obviously not job related and cause a substantial disparate impact. A relatively weak retaliation claim that may not embolden employees to challenge unlawful employment practices may remain. That core of claims would provide some protection to employees but nothing like what is necessary for Title VII to meet its potential and its promise. Unless something changes, this may be Title VII's brave new world.

## CONCLUSION

There is a core of Title VII that the Supreme Court cannot and would not dare kill. However, the Court is chipping away at Title VII. That chipping away is narrowing Title VII's potential effect. Unless Congress is ready to defend and amend Title VII when necessary and make sure that future Supreme Court justices are going to protect Title VII in a way that the justices have not in the past few decades, Title VII's relevance will diminish and workplace justice will become more difficult to find.

The Court would argue that it is not chipping away at Title VII or moving it in any particular direction. Rather, the Court would argue that it is merely deciding the cases that come before it consistent with Title VII's text and prior precedent. That is the standard vision of what a court does, but it is not a complete picture. As the Supreme Court interprets Title VII, it can always choose from multiple paths. When choosing a path, the Court can choose a path that is consistent with Title VII's purpose and history, or it can choose a path that may not be consistent with that purpose and history. The Court has done the latter with respect to a number of

219. *See supra* Part II.A.

cases over the past several years. Those actions have eroded Title VII somewhat. If the Court continues, the erosion will continue.

Title VII is more than just a collection of words. It reflects an idea. It was drafted and passed with a purpose. Choices that the Supreme Court makes that appear inconsistent with the statute's purpose do not reflect Title VII's text; they reflect the Court's mindset. To ensure that Title VII functions as it should, the Court ought to change its mindset, with help if necessary.